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Supreme Court, U.S.
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No. 03-1500

In The

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

In support of the *Respondent*

Barry C. Hodge
Counsel of Record for Amicus Curiae
Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

SUMMARY OF THE ARGUMENT

This brief will explain why this case should be remanded with instructions to dismiss the appeal for want of jurisdiction. Although Establishment Clause claims are now regularly brought under 42 U.S.C. § 1983, Congress never intended this to be the case. An examination of the legislative history of § 1983, 42 U.S.C. § 1988, and of the Fourteenth Amendment will demonstrate this fact.

However, should this Court disagree, the brief will also argue that this case should be decided under *Marsh v. Chambers*, 463 U.S. 783 (1983). The instant monument

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[1] The parties have consented to the filing of this brief. A copy of the letter of consent from Petitioner has been lodged with the Clerk of the Court. A copy of the letter of consent from Respondent accompanies this brief. No counsel for any party has authored this brief in whole or in part. To date, no person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel. A grant application is pending with the Alliance Defense Fund for work done on this brief. The Alliance Defense Fund is a 501 c 3 organization that helps public interest law firms and private attorneys fund their work in the public interest. The Alliance Defense Fund did not control the content of this brief, did not help author it, and did not even see it prior to completion.

passes muster under *Marsh*, because it is within two long-standing traditions which are validated by *Marsh*.

ARGUMENT

I. THIS CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO DISMISS THE APPEAL FOR WANT OF JURISDICTION BECAUSE ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. § 1983.

This lawsuit was brought pursuant to 42 U.S.C. § 1983. Because § 1983 (and its jurisdictional counter part 28 U.S.C. §1434(3))[2] does not give the federal courts jurisdiction in Establishment Clause cases, this case should be remanded with instruction to dismiss the appeal for lack of subject matter jurisdiction.

At first blush, this assertion may seem counterintuitive since plaintiffs have developed the habit of routinely using § 1983 as a vehicle for Establishment Clause claims. However, as this Brief will demonstrate, Congress never intended this to occur.

At least one federal court has directly raised—but not answered—the question of the appropriateness of bringing Establishment Clause claims under § 1983. In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution

[2] This Court explained the relationship between § 1983 and §1434 (3) in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972). However, because some of the opinions of this Court with which this brief will interact speak of jurisdiction under § 1983, this brief will follow suit and use this shorthand.

and the co-extensive Establishment Clause of the Hawaii Constitution. The Ninth Circuit upheld the district court's granting of summary judgment in favor of the government defendants. However, along the way, the Ninth Circuit questioned, without further addressing, the "efficacy" of bringing the Establishment Clause claim under § 1983:

> Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (simply noting that establishment clause challenge was brought under § 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

Cammack, 932 F.2d at 768 n.3

Since *Cammack*, additional cases, such as *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), have reached this Court in a similar posture to *Allegheny*, that is, the Establishment Clause claim has been brought under § 1983 without the Court acknowledging that fact. However, to date, *Marsh* remains the only case brought under § 1983 in which the Court has both acknowledged that fact and decided the claim on the merits. Thus, no great body of case law from this Court stands for the proposition that Establishment Clause cases *should* or *can* be brought under § 1983.

Furthermore, this Court has often allowed certain

types of claims to come before it on multiple occasions without comment and then, when a subsequent party squarely raised the jurisdictional issue, this Court has decided that such claims were not properly brought. In fact, this Court has done this on several occasions in the § 1983 context. For example, this Court had often accepted cases in which a state had been sued under § 1983 before deciding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) that a state is not a person for purposes of § 1983. *See, e.g.*, cases collected in *id.* n.4. Significantly, the *Will* Court specifically noted that "'this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 535, n. 5 (1974)." *Id.* (brackets original).

Therefore, this Court should follow the lead of the *Cammack* court and question whether § 1983 is a proper vehicle for bringing an Establishment Clause claim. The only reason that the *Cammack* court did not answer the question was because the parties did not raise the question. However, *Amicus* is hereby squarely raising the question,[3] and, for the reasons stated below, this Court should conclude that § 1983 does not cover Establishment Clause claims and that, therefore, the appeal should be dismissed.

Until the passage of 42 U.S.C. § 1988, The Civil Rights Attorney's Fee Awards Act of 1976, virtually no Establishment Clause cases were brought under § 1983. Since the passage of that act, the number of cases has exploded. While the date of enactment is not a perfect dividing line because of cases that were already "in the pipeline," it is a close proxy. For ease of demonstration, the number of opinions available on Lexis serves as an

[3] This Court has previously stated that it will consider arguments raised only by an amicus curiae. *Davis v. Unites States*, 512 U.S. 452, 457 (1994).

adequate indicator. To the best of *Amicus'* ability to ascertain, prior to the enactment of § 1988 (*i.e.*, in the entire period from § 1983's enactment in 1871 until § 1988's enactment in late 1976), only 34 opinions are available in which both § 1983 is cited and the term "Establishment Clause" is used. In contrast, in the less than thirty years subsequent to § 1988's enactment 640 such cases can be found.[4]

The reason for this dramatic increase seems obvious. Justice Powell suggested the reason in his dissent in *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980)[5]: "There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought. . . . [I]ngenous pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."

Today this phenomenon has turned into a virtual "blackmail scheme" by strict separationists. In other words, the statistics noted above do not begin to tell the whole story. Many lawsuits are not filed or are quickly settled because public interest law firms and others threaten localities and state defendants with the prospect of paying enormous attorney fee awards. *See generally*, Steven W. Fitschen, *From Black Males to Blackmail: How the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's Most*

[4] Admittedly, not every opinion found with this technique will actually deal with an Establishment Clause claim brought under §1983. However, the statistical point is still valid.

[5] The context of his remarks was different than that being addressed (*i.e.*, possible abuse of pendant jurisdiction), however, the concern is transferable.

Historic Civil Rights Statutes (forthcoming).[6] As just one example, Indiana Civil Liberties Union attorney Kenneth Falk was interviewed for an article in the *Indiana Lawyer* about Ten Commandments monuments. Discussing the possibility of lawsuits, Falk stated, "If we prevail, we get fees, and they're going to pay the ICLU an enormous amount of fees." Cited in *id.*

Were it not for one thing, all of this might be chalked up as the price of "doing business," *i.e.*, of erecting monuments that one knows strict separationists object to. That one thing is congressional intent. Ironically (given the uses to which § 1988 has been put), the legislative history of § 1988 gives us some insight into the legislative history of § 1983, and these two histories show clearly that Congress never intended § 1983 to cover Establishment Clause claims.

Looking first at the legislative history of § 1988, it is plain that the purpose of the Act was to restore the ability of plaintiffs to get attorneys' fees *in civil rights lawsuits only*. The Act was a response to this Court's decision in *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975). In *Alyeska*, this Court had declared that attorneys' fees would no longer be available to plaintiffs in federal lawsuits unless Congress expressly authorized such fees by statute. *Id.* at 269-71. *Alyeska* itself was an environmental case, not a civil rights case. Yet Congress' great concern was with restoring attorneys' fees in traditional *civil rights* cases.

As Senator John V. Tunney, Chairman of the Senate Judiciary Subcommittee on Constitutional Rights noted when he introduced the original version of the bill that became the Act:

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[6] A working draft of this article is available at http://www.nlf.net/articles/blackmail.pdf.

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary, 94th Cong. 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 1988, S. 2278, Source Book: Legislative History, Texts, and Other Documents* (1976) at 3. [Hereinafter, *Source Book*.]

The emphasis throughout the debates on the Act remained single-minded: Americans who were the victims of racial discrimination needed to be able to attract attorneys through a fee-shifting provision. There was simply no thought that Establishment Clause claims would fall under § 1988 provisions. *See generally*, *Sourcebook* throughout; Fitschen, *supra*, throughout. One of the main proponents of the Act was Senator Edward Kennedy (D-Mass). Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination" in areas such as "jobs, housing, credit, or education" using the "civil rights laws." *Sourcebook* at 23.

Furthermore, the legislative history is also abundantly clear that only two additional provisions were added as part of the political give and take needed to ensure passage of the Act: The Title IX provision protecting against sex discrimination in education, and the provision for the protection of taxpayers defending themselves against suits or proceedings by the Internal Revenue Service. *Source Book* at 21-22, 197-98. Congress simply did not intend to provide for fee-shifting in Establishment Clause cases.[7]

Secondly, the legislative history of § 1983 itself confirms that the drafters of § 1988 correctly understood the intended coverage of § 1983. Section 1983 is one of the surviving provisions of the Ku Klux Act of 1871. Section 1983 started out as § 1 of that Act. As numerous courts and commentators, including this Court, have documented, § 1 was one of the provisions that Congress debated least. *See, e.g. Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 665 (1978). However, the meaning of "rights, privileges and immunities" can be determined by examining the debate over the entire act.

The starting point for this process is to note that, as a bill, the Act was entitled "A Bill to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." *Cong. Globe*, 42 Cong., 1st Sess. 597 (1871). In that context, it is significant that after Representative Shellabarger (R., Ohio) reported the bill on behalf of the Select Committee, Representative Stoughton (R., Michigan) spoke to set the stage. *Id.* at 599. He started with the activity of the Ku Klux Klan in North Carolina. *Id.* at 599 ff. He noted "murders, whippings, intimidation,

[7] Similarly, none of the subsequent additions and deletions is in any way relevant to Establishment Clause claims. *See* 42 U.S.C. 1988(b).

and violence." *Id.* He also discussed the Klan's ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries. *Id.* at 600. Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee. *See generally, id.* at 600 ff. He read testimony of Blacks who had been victims of violence and he read testimony of Whites who knew the inner workings of the Klan, as well as of judges who knew of incidents of perjury. *Id.* Near the end of his remarks, he summarized the need for the act:

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."

Id. at 606.

With all of the preceding as background, it is readily understandable that the most common view of "rights, privileges, and immunities" was one that equated it with life, liberty, and property. *See, e.g., Cong. Globe*, 42 Cong., 1st Sess. 615 (1871). However, some

Congressmen gave extended comments with illustrative examples of the concerns that animated the passage of the Act. None raised any Establishment Clause concerns. The following example by Representative John Coburn is typical of the more extended remarks:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A

> systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it.

Id. at 619-20.

This quotation, typical of many others, reminds the modern student of the Act that one must never stray far from the historical context of Klan abuses if one wants to understand what § 1983 was intended to do. Here again, one sees a close connection between the concepts of equal protection and of rights, privileges, and immunities. Moreover, one also finds some specific rights mentioned, *i.e.*, "the right[s] to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms." *Id.*

Furthermore, during the debates over the meaning of "rights, privileges, and immunities" a distinction was made between civil rights and political rights. *See, e.g.*, *Cong. Globe*, 42 Cong., 1st Sess. 635-36 (1871). While the meaning of those terms was not fixed even then, *see id.*, and while the use of these terms has changed to some extent today, civil rights were generally seen as those fundamental rights spelled out in the nation's charter, the Declaration of Independence, and to which all persons were entitled by the law of nature. At a minimum, the debates indicate, *see id.*, that Congress understood, and if anything, more sharply drew, the modern black letter law distinction:

> It has been said that political rights are

> included within the more comprehensive term "civil rights," but that they are differentiated in that a political right is a right exercisable in the administration of government, or a right to participate, directly or indirectly, in the establishment or management of government, while civil rights have no relation to the establishment or management of government. Political rights have also been distinguished on the ground that a civil right is a right accorded to every member of a distinct community or nation, which is not necessarily true with regard to political rights.

15 Am. Jur. 2d Civil Rights § 2 (citations omitted).

With this distinction very much in the forefront of debate, Congress intended § 1983 to cover only civil rights. The Establishment Clause is relevant to the "establishment or management of government." Does that mean that governments can therefore willfully violate the Establishment Clause with impunity? Certainly not. Assuming *arguendo* that this Court should conclude that the instant monument violates the Establishment Clause (a position with which *Amicus* would disagree), Mr. Van Orden (as any aggrieved citizen of any locality or state) could sue directly under the Establishment Clause instead of under § 1983—as was routinely done prior to 1976. All that would be lost would be the "blackmailing" effect of the § 1988 fees anticipated by Justice Powell and never intended by Congress.

Despite the force of the historical argument, the position advocated here faces the problem of

overcoming *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980). In that case, this Court held that statutory § 1983 claims should not be limited to civil rights statutes only.

However, that problem is not insurmountable. This Court could simply decide that the *Thiboutot* minority had the better of the argument over the legislative history of § 1983 and overturn *Thiboutot* to the extent necessary. However, this Court *need not* do so to decide that Establishment Clause claims are not properly brought under § 1983. After all, the Ninth Circuit was well aware of *Thiboutot* when it questioned whether § 1983 was a legitimate vehicle for bringing Establishment Clause claims (having, according to a Lexis search, cited or quoted it 28 times prior to issuing its *Cammack* opinion) and it did not think that *Thiboutot* foreclosed the question.

This Court can simply acknowledge that deciding that § 1983 covers all laws (which after all by definition implicate "rights, privileges and immunities") is analytically distinct from deciding that the Establishment Clause encompasses any "rights, privileges [or] immunities at all. While the validity of this distinction is arguably demonstrable from the legislative history of the Ku Klux Act, *see* Fitschen, *supra*, it is even clearer when one looks at the legislative history of and scholarship about the Fourteenth Amendment itself.

Various views existed as to what the Privileges and Immunities Clause of the Fourteenth Amendment was meant to include and, indeed, each of the opinions written in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) could find support in the legislative history of that

Amendment. *See*, Fitschen, *supra*, Section IV. However, all of those views have one thing in common: none sees the term "privileges and immunities" as implicating the Establishment Clause—even were it to be restated in terms of "a right to be free from establishment of religion."

Chester Antieau, a leading § 1983 expert, collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment and which the Fourteenth Amendment was designed to "constitutionalize") and from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth Amendment*. These statements clearly demonstrate that the free exercise of religion was intended to be covered by the term "privileges and immunities" but that "freedom from establishment" was not.

Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect it. *Id.* at 91. By contrast, Antieau could find no evidence of any Senator or Representative mentioning "freedom from establishment." *Id.* at 108 ff. There is more than mere silence to the argument however. At least three important commentators, Senator Howard, Representative H. L. Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause. *Id.*

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity. *Id.* at 108 ff, 282-285. This evidence includes state statutes, constitutions, and court decisions. Some states still had vestiges of true establishment. For example, both New Hampshire and Massachusetts still provided constitutional preferences for Protestant Christianity. *Id.* at 110. These states, as Antieau points out, would not have ratified the Fourteenth Amendment if they thought it would endanger their establishments.

Therefore, there is no right, privilege or immunity implicated by the Establishment Clause. Thus, *Thiboutot* is no obstacle to the argument advanced here.

Thus, for the various reasons just described, this Court should recognize that § 1983 does not give the federal courts jurisdiction over Establishment Clause claims and it should vacate the opinion of the Court of Appeals and remand the case with instructions to dismiss the appeal for want of jurisdiction.

II. THE MONUMENT SHOULD BE EVALUATED AND UPHELD UNDER *MARSH V. CHAMBERS* BECAUSE IT FALLS WITHIN TWO PRACTICES THAT ARE "DEEPLY-ROOTED IN OUR HISTORY AND TRADITION."

However, should this Court disagree, *Amicus* urges

this Court to affirm the decision of the Fifth Circuit. The court below correctly concluded that Ten Commandments display passes each prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and does not represent an establishment of religion. *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003). However, this Court, in granting *certiorari* in *McCreary County, Kentucky v. ACLU of Kentucky*, No. 03-1693, certified two questions of import to this case, namely whether *Lemon* and its test should be overruled and, if so, what test should take its place. *Amicus* believes that *Lemon* should be overruled and that a test which correctly articulates the concerns of the Framers should replace it. However, in certain situations, including this one, the test articulated in *Marsh v. Chambers*, 463 U.S. 783 (1983), stands as a proxy for those concerns. The *Marsh* test asks whether the long-standing practice at issue, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n. 4 (1985) (Powell, J., concurring) (citation omitted). This approach is the valid one for the case at hand.

As Chief Justice Rehnquist has noted, "[a]ny deviation from [the Framers'] intentions frustrates the permanence of that Charter and will only lead to . . . unprincipled decisionmaking . . . ." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).[8] Therefore, the importance of deciding this case in light of history cannot be overstated. In making its decision, this Court should focus on the historical context, which gave

[8] Similarly, James Madison, the chief architect of the First Amendment, stated that the proper approach to the Constitution was to "resort[ ] to the sense in which the Constitution was accepted and ratified by the nation." Letter from James Madison to Henry Lee (June 25, 1824), *in* IX The Writings of James Madison, at 191(Gaillard Hunt, ed. 1910).

rise to our long tradition of publicly expressing religious sentiments, and not on the religious content of the monument or even its secular aspects. An inquiry conducted in the light of history will lead inevitably to the conclusion that the display of the city's monument is consistent with the Framers' understanding of the First Amendment.

We first note that some courts have tried to limit *Marsh* to chaplaincy cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist.* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, such an approach is clearly not that of this Court. Indeed, this Court has not even limited *Marsh* to Establishment Clause cases. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997); *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991). In *Printz*, this Court considered whether federal use of state executives in law enforcement was a power exercised by the first Congress. *Printz*, 521 U.S. at 905. There, it "rest[ed] its conclusion" on its examination of evidence found "in the early years of the Republic." *Printz*, 521 U.S. at 948-49 (Stevens, J., dissenting). This Court in *Harmelin* cited *Marsh* in its historical examination of whether the Eighth Amendment provided a proportionality guarantee against cruel and unusual punishment. *Harmelin*, 501 U.S. at 980. It is clear that courts that have constrained *Marsh* to chaplaincy cases are wrongly decided, in light of this Court's precedent.

Lower courts have also engaged in *Marsh's* historical analysis in a variety of case settings. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote in House of Representatives Committee of the Whole); *Dornan v. Sanchez*, 978 F. Supp. 1315, 1319 (C.D. Cal. 1997) (upholding discovery subpoena rule under Federal Contested Elections Act); *Nat'l Wildlife Fed'n v. Watt*,

571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining leasing federal lands for coal mining); *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983) (evaluating Indian Commerce Clause).

Further, where *Marsh* has been applied in the Establishment Clause context, it has not been limited to legislative prayer cases. Of chief importance, courts have applied *Marsh* in religious display cases. *See e.g., ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986). Courts have also used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); the prayer room at the Illinois statehouse, *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir.1988); public proclamations with "religious" content, *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla.1989); the dating of government documents with "A.D.", *benMiriam v. Office of Pers. Mgmt.*, 647 F. Supp. 84, 86 (M.D.N.C. 1986); religious expression in the form of an invocation and benediction at a public university annual graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); and the Pledge of Allegiance recited in a public school, *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

Of course, the most significant consideration here is that this Court has never overturned *Marsh*, either explicitly or *sub silentio*. This Court had every opportunity to do so in *Lee v. Weisman*, 505 U.S. 577 (1992), and instead chose merely to distinguish the case.

In *Weisman*, this Court noted *Marsh's* on-going viability and explained why it would not apply *Marsh*. *Weisman*, 505 U.S. at 596. This Court did not overturn, criticize, or even question *Marsh*; nor did it characterize *Marsh* as anomalous. The Court merely stated that

"[i]nherent differences between the public school system and a session of a state legislature distinguish[ed] [*Weisman*] from *Marsh v. Chambers*." *Id.* (citation omitted). This Court went on to note that, while the invocation and benediction at issue in *Lee* were in many regards similar to the issues considered in *Marsh*, there were obvious differences. *Id.* at 597. Those differences were the age of the people hearing the prayers, the ability to leave if desired, and the context in which they heard the prayers. *Id.* This Court stated that the "decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to distinguish the *public school context*." *Id.* (citations omitted) (emphasis added). Relying primarily on the young age of the school children, this Court found that the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* This Court also noted that the "*Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there." *Id.*

In the instant case, all of the differences noted in *Lee* are absent. At the most basic level, this is a *display* case, not a school prayer case. Yet, significant differences as to context, setting, and audience exist in this case. Here, the monument stands on the Texas state capitol grounds, outdoors, in the company of seventeen other monuments and memorials. *Van Orden*, 2002 U.S. Dist. LEXIS 26709 at 4-5. The experience of Mr. Van Orden aptly describes the typical audience; he has been exposed to its presence on the capitol grounds on his way to and from the Texas State Law Library. *Id.* at 7. The monument cannot capture an unwilling audience, and Mr. Van Orden can, of course, leave its premises at will or avoid it altogether. The delivery of the religious message is also inherently subject to the viewer's free will. The

viewer must, by deliberate affirmative act, choose to read the inscribed message in order to ascertain its content. Finally, the age of the viewer is not an issue here since, even if a significant number of children are on state grounds, they are no more captive to the monument's inscription than another passerby and, in fact, would likely be less attentive to the contents of the monument than would an adult. As such, it is hard to imagine an Establishment Clause scenario further removed from the distinguishing elements in *Weisman*.[9] Simply put, *Marsh* controls this case.

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id.* and that it had "become part of the fabric of our society." *Id.* at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court stated that the *actions* of the First Congressmen corroborated their intent that prayers before legislatures not contravene the Establishment Clause. *Id.* at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id.* at 788.

Some courts have been willing to consider a challenged practice under *Marsh*, but have applied it at an improper level of abstraction. One of the most egregious examples is provided by the district court in *Glassroth v. Moore*, 299 F. Supp. 2d 1290, (M.D. Ala. 2003), the case

[9] Furthermore, children would be just as much or as little influenced by the practices described below as by the monument. Therefore, the analysis that follows is yet another reason why the presence of children on the capitol grounds is not a dispositive concern.

in which the Ten Commandments monument in the Alabama Judicial Building was challenged. This is best understood by comparing that court's opinion with the opinion of the Sixth Circuit sitting *en banc* in *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001), which approved the display of the state motto containing a religious inscription.

In that case, the ACLU sued to enjoin the placement of the State motto of Ohio, "With God, All Things Are Possible," and the state seal in a large display in the plaza in front of the state Capitol. *Id.* at. 292. In rejecting the Establishment Clause claim, the Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The Sixth Circuit specifically noted the following: President Washington's congressionally-solicited Thanksgiving Proclamation, Congressional chaplains, the reenactment of the Northwest Ordinance, the references in forty-nine state constitutions to God or religion, court decisions calling for the veneration of religion, the upholding of blue laws, Thanksgiving Proclamations by presidents other than Washington, President Lincoln's Gettysburg Address, and the repeated upholding of "In God We Trust" on our currency. *Id.* at 296-301.

Two points stand out about the Sixth Circuit's analysis. The first point is that the *Capitol Square* court took one of *Marsh's* most cited principles and applied it directly to a display case. Having traced acknowledgements of God back to the First Congress, the Sixth Circuit concluded that the Ohio motto display which also acknowledges God was constitutional under *Marsh*:

> The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government

> from acknowledging the existence of Him whom they were pleased to call "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the monument in question clearly passes constitutional muster.

Capitol Square, 243 F.3d at 300.

The second point is that the Sixth Circuit did not consider historical evidence involving only religious displays. In fact, *none* of its examples dealt with religious displays. Thus, the Sixth Circuit understood that the *Marsh* analysis must be done at the proper level of abstraction.

In comparison, the *Glassroth* court's analysis was conducted at the wrong level of abstraction. It asked whether "members of the Continental Congress displayed the Ten Commandments in their chambers." *Glassroth*, 229 F. Supp. 2d at 1308.[10] Under this test, the Sixth Circuit should have held the display of the Ohio motto unconstitutional absent evidence that the Continental Congress had displayed it in its chambers. Merely stating this approach highlights its failings.

[10] Admittedly, *Glassroth* involved other factually unique aspects. Nonetheless, the statement quoted above was given as another reason why the monument violated the Establishment Clause.

Similarly, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order (N.D. Ind. Mar. 19, 2004), the district court held that the tradition of erecting Ten Commandments displays only began in the 1940s; thus, it could not meet the *Marsh* standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition." Here again, the Capitol Square court's approach is the better one—Ten Commandments displays are part of a larger tradition that does have an adequate historical pedigree. Indeed as will be demonstrated below, these monuments are actually part of two important traditions.

A. The Monument Should be Upheld Because it is Part of a Long-standing Tradition of Inscribing Religious References on Public Property.

This nation has a long-standing tradition of inscribing religious sentiments and scriptural references on government property. Examples abound, but the following list illustrates the point:[11]

- In the House of Representatives Chamber, in our nation's Capitol, directly above and behind the Speaker's Chair is the inscription, "In God We Trust."
- Directly opposite the Speaker's Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear, this one has the most prominent position.
- In the Capitol is a private room dedicated for use by members for prayer and

[11] The examples are drawn from Catherine Millard, *God's Signature Over the Nation's Capital* (1988).

meditation. This room contains a stained glass window, depicting George Washington with his hands clasped together in prayer.

- In the main reading room of the Library of Congress are two statues, one of Moses, and one of "Paul, Apostle to the Gentiles."
- The Lincoln Memorial, on its north wall, bears the words of Lincoln's Second Inaugural Address, in which he uttered a number of religious sentiments and quoted directly from scripture, including the verse from the Old Testament: "The Judgments of the Lord are righteous and true, altogether."
- In Arlington National Cemetery, at the Tomb of the Unknown Soldier, these words appear: "Here lies in Honoured glory, An American soldier known but to God."

Displaying the Ten Commandments on a monument on state capitol grounds is in no way different from these practices.

Though some would expunge our history of all things religious, they cannot escape the fact that our nation's past is replete with public proclamations of our belief in God and His sovereignty. This type of public expression is a longstanding, uninterrupted tradition that has enriched our nation, and one which should not fall under Mr. Van Orden's unforgiving view of the Establishment clause. The display is simply "a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

B. <u>The Monument Should be Upheld Because it is Part of a Long-standing Tradition of Governmental Acknowledgement of the Role of Religion in Society and of God.</u>

The monument is also part of a long-standing tradition of governmental acknowledgement of the role of religion in American life. At the time the First Amendment was drafted, officials of our new government took part in, or were witness to, numerous instances of such acknowledgements. These acknowledgements were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

In *Marsh*, the Supreme Court cited much of this history in support of its finding that legislative prayer was a constitutional practice, and found this history relevant to its analysis. That Court noted, for instance, that just three days after the First Congress authorized appointment of paid chaplains to open sessions of Congress with prayer, the same Congress reached final agreement on the language of the First Amendment. *Id.* at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true, moreover, for the executive as well as the legislative branch. George Washington, in his first inaugural address, also acknowledged America's religious heritage:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential

> aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government. . . .

George Washington, First Inaugural Address, *in* I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897).

In fact, it was the first Congress that urged President Washington

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging . . . the many . . . favors of Almighty God. . .

Id. at 56.

As this Court has noted, this Thanksgiving resolution was passed by the Congress on the *same day* that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788, n. 9; *Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). President Washington did, in fact, set aside November 26, 1789 as a day on which the people could "unite in most humbly offering [their] prayers and supplications to the great Lord and Ruler of Nations . . . and [to] beseech Him to pardon [their] national and other transgressions. . . ." I *Messages and Papers* at 56.

Furthermore, many of these acknowledgements go beyond acknowledging the role of religion in American life. They directly acknowledge God Himself. The display of the Ten Commandments is perfectly consistent with our centuries-old tradition of government publicly acknowledging God's sovereignty in our nation's affairs. For reasons noted above, consistency with historic practice

is highly relevant to this case, and a factor to which the Court should give considerable weight. Examples too numerous to mention could be cited, but the following brief list illustrates the wealth of this tradition:

- *Thomas Jefferson's Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins: "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author of our religion," who is described as "Lord both of body and mind."[12]
- *The Declaration of Independence* acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."
- *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[13]
- *George Washington* frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion that it was "the *duty* of all nations to acknowledge the providence of Almighty God. . . ."[14]

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[12] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).

[13] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).

[14] *See Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897)

- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[15]
- *Abraham Lincoln* frequently made public expressions of religious belief. One of many examples is found in a Proclamation he issued August 12, 1861, in which he called for a national day of "humiliation, prayer, and fasting for all the people of the nation . . . to the end that the united prayer of the nation may ascend to the Throne of Grace and bring down plentiful blessings upon our country."[16]

Lincoln apparently saw no conflict between the First Amendment and his very public exhortations to the citizens that they should "humble [themselves] before [God] and . . . pray for His mercy" and that they should "bow in humble submission to His chastisements."[17]

(emphasis added). Other examples, include: (1) First Inaugural Address, April 30, 1789 (acknowledging "the Almighty Being who rules over the Universe"), *Id.* at 43; (2) Message to the Senate, May 18, 1789 (seeking a "divine benediction . . . ."), *Id.* at 47; (3) Fifth Annual Address to Congress, December 3, 1793 ("humbly implor[ing] that Being on whose will the fate of nations depends . . . ."), *Id.* at 131; (4) Sixth Annual Address to Congress, November 19, 1794, *Id.* at 160 ("imploring the Supreme Ruler of Nations to spread his holy protection over these United States . . . ."); (5) Eighth Annual Address to Congress, December 7, 1796, *Id.* at 191 (expressing "gratitude to the Ruler of the Universe . . . ."); and (6) Farewell Address, September 17, 1796, *Id.* at 213 (invoking "Providence . . . .").

[15] Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

[16] Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).

[17] VII *Messages and Papers of the Presidents* 3237.

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs, and the tradition continues to this day.[18]

Thus, whether the instant monument be characterized as acknowledging the role of religion in American life or as acknowledging God, it is well within a long-standing tradition validated by *Marsh*. As noted above, the historical acceptability and longevity of a practice should mean that we, today, begin our analysis with the presumption that these practices, or those sufficiently similar, are indeed constitutional. *County of Allegheny*, 492 U.S. at 670. (Kennedy, J., concurring in part and dissenting in part).

A decision in favor of Mr. Van Orden's view would be in direct conflict with the intentions of the Framers of the First Amendment, and with practices and traditions of this nation which have endured for generations, and which continue to this present day. Throughout our nation's history our government has openly declared its faith in, and reliance upon, God and His favor.

This history is a source of pride to some, and of embarrassment to others, but it is our history, nonetheless. This Court must therefore decide this case in the light of that history. The display of the Ten Commandments monument will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell, or the national motto on our coins.

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of

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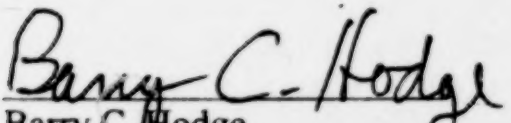
[18] Furthermore, the above examples serve to show that when the Capitol Square ordered that the New Testament attribution be removed from the Ohio motto display, *Capitol Square*, 243 F.3d at 310 it need not have done so.

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim should be placed firmly and irrevocably upon those who, by their "untutored devotion to the concept of neutrality," *Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would make it their business to deny the citizens of Texas this simple acknowledgement of their history and tradition.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the Court of Appeals and remand the case with instructions to dismiss the appeal for want of jurisdiction. In the alternative, this Court should analyze the monument under *Marsh* and affirm the decision of the Court of Appeals.

Respectfully Submitted,
this 31st day of January, 2005



Barry C. Hodge
Counsel of Record for
Amicus Curiae,
WallBuilders, Inc.
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 34545
(757) 463-6133